United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-6164

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-6164

ANNA SELMA VINJE MORPURGO,

Appellant,

v.

PROFESSIONAL STAFF CONGRESS/CUNY, et al.,

Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLEE

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ISSUE PRESENTED

Whether the district court properly dismissed plaintiff's complaint against the EEOC defendants.

STATEMENT OF THE CASE

This is an appeal from a summary judgment dismissing a complaint under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (Supp. V, 1975) and 42 U.S.C. §1985(3) against, inter alia, seven employees of the Equal Employment Opportunity Commission. Plaintiff alleged that the EEOC defendants, together with various state employees, conspired to deprive her of her civil rights in that they wrongfully excluded her from academic positions and the EEOC failed to find probable cause in her favor.(Doc. 10). In addition to these contentions, she asked the court to review the EEOC's determination finding no probable cause to credit her charge. (Doc. 10 at 5).

The documents submitted on motions to dismiss and for summary judgment by the various defendants show the following facts relevant to the claims against the EEOC defendants:

On April 13, 1972, plaintiff was informed by her employer, the Board of Education of the City of New York (BHE), that she had been found to be professionally incompetent and would not be reappointed

as an adjunct lecturer in philosophy at the Queensborough Community College of the City of New York (CUNY). (Attachment to Doc. 22, Arbitration Award at 2-7).

On September 28, 1973, plaintiff, through the law firm of Vladeck, Elias, Vladeck & Lewis, filed a charge of sex discrimination against the College and Board of Education with the New York District Office of the Equal Employment Opportunity Commission. She claimed that she had been denied reappointment in retaliation for her opposition to the University's sexually discriminatory policies. (Doc. 21 at 20). She subsequently amended this charge several times to add parties, asserting that the BHE, the Vladeck law firm, and others had conspired to suppress her grievance and to harass her for advocating "racial integration," "sexual freedom," "and religious skepticism." (Doc. 21 at 22-23).

On November 12, 1973, plaintiff filed a charge with the New York State Division of Human Rights (NYSDHR) contending that the BHE and others had retaliated against her for filing a grievance with

her union.[1] The charge was dismissed for lack of jurisdiction. Thereafter, plaintiff filed another charge with the NYSDHR claiming further acts of harassment and retaliation. After an investigation, the NYSDHR issued a determination finding no probable cause to believe that the respondents were guilty of the discriminatory practices alleged.

On August 1, 1975, the EEOC found no reasonable cause to believe that plaintiff's charges established a violation of Title VII. With respect to CUNY, the BHE, and the Professional Staff Congress, the New York District Director (Arthur Stern)[2] made the determination on the basis of the findings and record of the state agency. He stated that plaintiff had submitted no objective evidence to substantiate her allegations of retaliation and harassment,

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1/ Plaintiff filed a grievance with her union, the United Federation of College Teachers, later replaced by the Professional Staff Congress/CUNY, also a defendant in this action. On August 27, 1973, the arbitrator dismissed plaintiff's grievance, finding that the decision not to reappoint her was neither arbitrary nor discriminatory.

2/ Arthur Stern was formerly Director of Regional Affairs for the New York State Division of Human Rights. It was in this capacity that he had also issued the determination of the state agency.

that the record showed that the Personnel and Budget Committee had recommended against her reappointment on the basis of unfavorable job evaluations, and that none of the evidence gathered during the investigation showed that plaintiff had been terminated in retaliation for her activities in support of women and blacks. He also noted that the union had taken plaintiff's grievance to arbitration and that the grievance had been denied. As to the numerous other organizations, associations, and individuals named as co-respondents, the Director found that the EEOC was without jurisdiction since those respondents were not employers, employment agencies or labor organizations within the meaning of Title VII.

The district court dismissed plaintiff's complaint against the EEOC defendants, noting that although plaintiff alleged that the individually named defendants "conspired...to fail to prevent a conspiracy to interfere with [her] civil rights," she was, in fact, challenging the EEOC's no cause determination. The court also found that as to the conspiracy charges, the amended complaint failed to set forth any facts indicating the existence of a

conpiracy. (Attachment to Doc. 26 at 38).

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S ACTION FOR FAILURE TO STATE A CLAIM.

1. As the district court held, plaintiff's allegations of wrongdoing by the EEOC defendants seem to stem from the fact that the EEOC found no probable cause to sustain her charges of retaliation and harassment. Plaintiff apparently believes that the EEOC defendants acted improperly in considering and relying on the investigation conducted by the New York state agency. There was in fact no wrongdoing by the EEOC in this respect.

Section 709(b) of Title VII, 42 U.S.C §2000e-8(b),[3/] provides that the EEOC may "utilize the

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3/ Section 709(b), provides in pertinent part:

> The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title. . . utilize the services of such agencies and their employees....In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements

[continued on next page]

services" of state agencies "for purposes of carrying out [the EEOC's] functions and duties." It authorizes the EEOC "to refrain from processing a charge in any case" where it determines that it "serves the interest of effective enforcement" of the Title to rely instead on the efforts of the state agencies. It further allows the EEOC to relieve any person charged with discrimination of any requirement imposed by Section 709--including the obligation contained in 709(a) to provide the EEOC with information relevant to a charge. It is therefore clear that Congress intended to allow the EEOC to rely on state agency efforts--including investigations--where in the EEOC's judgment it would be appropriate to do so.

Moreover, the no cause determination by EEOC deprived plaintiff of no rights, since under the Title VII statutory scheme, the EEOC is not the "final arbiter" of charging party's claims. Fekete v. U.S. Steel Corp., 424 F.2d 331 (3rd Cir. 1970). Once the EEOC

[footnote continued from last page]

or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section....

dismisses a charge, the charging party is entitled to a de novo hearing in federal court. See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Chandler v. Roudebush, 425 U.S. 840 (1976).

For this reason, the district court properly held that it had no jurisdiction under Title VII to consider plaintiff's claim that the no cause determination was incorrect. Plaintiff's only right of action under Title VII is that provided in §706(f)(1) --a de novo action against her employer and union to determine whether their employment practices were unlawful.[4/]

2. Since, as discussed above, plaintiff's allegations fail to show any injury, her allegations of conspiracy fail to render her complaint one on which relief could be granted. To state a claim under 42

4/ If plaintiff had attempted to seek relief under the Administrative Procedure Act, 5 U.S.C. §§701-706 (1970), dismissal would similarly have been required. Section 704 of the APA provides that "final agency action for which there is no adequate remedy in court [is] subject to judicial review." Since, as we have shown above, plaintiff had an adequate remedy in court--i.e., a de novo hearing--the APA would not have provided a jurisdictional basis for her action.

U.S.C. §1985(3),[5/] the only subsection of §1985 applicable in this case, plaintiff must allege 1) that the defendants conspired to deprive her of her rights, 2) some acts which the defendants performed in furtherance of the conspiracy, and 3) that she was injured as a result of the conspiracy. Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1971); Powell v. Workmen's Compensation Board, 327 F.2d 131 (2d Cir. 1964); Sykes v. State of California, 497 F.2d 197 (9th Cir. 1974). Plaintiff's allegations meet none of these requirements.

As this Court said in Powell v. Workmen's Compensation Board, supra, 327 F.2d at 137:

> Plaintiff is bound to do more than state vague and conclusory allegations respecting the existence of a conspiracy. It [is] incumbent upon him to allege with

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5/ §1985(3) provides in pertinent part:

> If two or more persons in any State or Territory conspire...for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy.

In the instant case, plaintiff has failed to specify what rights were interfered with by the EEOC defendants, any acts taken in concert with the other defendants, or any injury as a result of the EEOC action. Her complaint founded on conspiracy was therefore properly dismissed.

CONCLUSION

For the reasons stated above, we respectfully submit that the district court's order dismissing plaintiff's complaint against the EEOC defendants should be affirmed.

Respectfully submitted,

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